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NTSB Order No. EA-3794

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 1st day of February, 1993

_____	)	
JOSEPH DEL BALZO,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-11082
v.	)	
	)	
BRENT C. BARKER,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from an oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held on November 13, 1990.<sup>1</sup>

In that decision the law judge held that respondent violated 14 C.F.R. 91.73(a) [now 91.209(a)] by operating his hot air balloon after official sunset when that balloon was not equipped with

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<sup>1</sup>Attached is an excerpt from the hearing transcript containing the oral initial decision.

lighted position lights,<sup>2</sup> but that the Administrator had failed to prove by a preponderance of the evidence that any of the three other incidents described in the order of revocation were in violation of the Federal Aviation Regulations (FAR). Accordingly, the law judge modified the sanction from revocation to a 30-day suspension of respondent's commercial pilot certificate.

The Administrator's appeal concerns the following allegation in the order of revocation (which served as the complaint in this proceeding):

3. On April 28, 1989, you operated your balloon as pilot in command with passengers aboard in weather conditions that were less than safe. Two convective sigmets had been issued for the local area and the closest reporting station reported towering cumulus [sic] clouds in all quadrants during the time of your flight.<sup>3</sup>

The Administrator argues that, contrary to the law judge's finding, a preponderance of the evidence shows that respondent

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<sup>2</sup>Respondent did not file an appeal from the initial decision. Therefore, his request that this violation be dismissed (contained in his response to the Administrator's appeal brief) will not be considered.

<sup>3</sup>The order of revocation also alleged that on one occasion respondent landed his balloon at or after sunset and that upon deflation the envelope draped over power lines (in violation of 14 C.F.R. § 91.9 [now 91.13(a)] and § 91.73(a) [now 91.209(a)]), and that on another occasion he operated his balloon with passengers at an altitude that caused undue hazard to persons and property on the surface and frightened a puppy which resulted in physical injuries to the dog (in violation of 14 C.F.R. § 91.9 and § 91.79(a) [now 91.119(a)]). The Administrator has not appealed from the law judge's finding that neither of these allegations was supported by the evidence.

violated FAR section 91.9<sup>4</sup> by operating his balloon as described above, and that his pilot certificate should be suspended for an additional 30 days. For the reasons discussed below, we deny the Administrator's appeal.

The Administrator introduced evidence at the hearing which showed that the FAA received several reports about respondent's balloon operations (e.g., flying after sunset and overweight takeoffs) and that, prior to initiation of this enforcement action, respondent was called in for counseling by an FAA operations inspector.

With regard to this particular incident, two witnesses for the Administrator testified that, sometime between 6:30 and 7:00 p.m. on April 28, 1989, they observed respondent launch and fly his balloon with passengers on board when a towering (or building) cumulus cloud was present over his launch site. One of those witnesses, Peter Carter, is the owner of a competing balloon operation. Mr. Carter testified that he had canceled his scheduled flight due to a weather report he obtained at 4:30 or 5:00 from a nearby FAA Flight Service Station indicating convective activity in the area, and forecasting thunderstorms. He stated that, because of the dangers associated with flying

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<sup>4</sup>Section 91.9 [now § 91.13(a)] provided:

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

balloons in thunderstorms, it is his policy not to fly whenever there is convective activity within 50 miles of his launch site.

The other witness, who was employed as Mr. Carter's crew chief, testified that at least two other balloon operators had canceled flights that evening due to the weather.<sup>5</sup> He also testified that he felt respondent's passengers were in danger.

The Administrator also put on evidence that at 7:00 p.m. the closest weather station (at Dallas-Fort Worth International Airport) was reporting scattered clouds at 5,000 - 5,500 feet with cirro-form clouds above, 87 degree temperatures, surface winds of 6-9 knots,<sup>6</sup> and towering cumulus clouds overhead and to the southeast. A quality assurance specialist from the Fort Worth Automated Flight Service Station testified that building, or towering, cumulus clouds indicate atmospheric instability in lower altitudes and are conducive to turbulence. A convective sigmet (i.e., a weather advisory issued for convective weather that is significant to the safety of aircraft) was also issued at 7:00, indicating the existence of an area of thunderstorms and cumulus clouds. The law judge determined, and the Administrator does not dispute, that this area was 35 miles away from respondent's launch site at its closest point.<sup>7</sup> The

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<sup>5</sup>The Administrator presented no direct testimony or documentary proof that these additional flights were canceled due to weather.

<sup>6</sup>There is no indication in the record that winds of this magnitude are in any way hazardous to balloon flight.

<sup>7</sup>According to a convective sigmet issued at 8:00 p.m., this area of thunderstorms and cumulus clouds had apparently moved

Administrator did not introduce evidence that any convective sigmets were issued earlier than 7:00 p.m.

Respondent testified that when he called for a weather briefing prior to his flight he was not informed of any adverse weather or convective sigmets in the area. The law judge noted that this was not inconsistent with the weather report Mr. Carter said he received. Respondent testified that after launching his balloon he noticed the towering cumulus cloud and, although he felt it was a safe distance away during the flight, he was concerned that it might blow in his direction. Accordingly, he terminated his flight without incident after 20 minutes in the air.

Upon review of the entire record in this case, we agree with the law judge that the Administrator did not prove by a preponderance of the evidence that respondent's actions were in violation of FAR section 91.9. We are specifically struck by the absence of any expert testimony in support of the Administrator's position that respondent's balloon operation was careless or reckless so as to endanger the life or property of another.<sup>8</sup> Certainly, some cases involve conduct that is so obviously

(..continued)  
closer to respondent's launch site during the intervening hour. However, we do not consider weather information issued at 8:00 to be relevant to a determination of whether respondent's operation, which took place before 7:00, was careless.

<sup>8</sup>Although Mr. Carter's crew chief testified that he felt respondent's passengers were in danger, in light of his minimal credentials (he testified he holds only a student pilot balloon certificate) we do not think that his opinion carries enough weight to tip the evidentiary scales in the Administrator's favor.

careless or reckless as to require no expert testimony on that point, but this is not such a case. The fact that other pilots may have concluded that flight was inadvisable under the prevailing weather conditions (building cumulus clouds with a potential for thunderstorms), and the fact that an area of thunderstorms and cumulus clouds existed 35 miles away, are not enough to convince us that respondent's flight under these conditions was careless or reckless within the meaning of FAR section 91.9.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is denied;
2. the law judge's initial decision is affirmed; and
3. the 30-day suspension of respondent's commercial pilot certificate shall begin 30 days after service of this order.<sup>9</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(f).